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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1250

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, etc., et al.,
Petitioners,

versus

ROBERT L. DOWELL, an Infant Who Sues by A. L. DOWELL, His Father and Next Friend,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF

In Opposition to Certiorari

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019
JOHN W. WALKER
HENRY L. JONES, JR.
WALKER, KAPLAN & MAYS, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 813 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Constitutional Provision Involved	2
Statement of the Case	3
Arguments	7
District Court's Discretion	7
Due Process	8
Conclusion	10

Cases Cited

Board of Education of Oklahoma City Public Schools v. Dowell, 375 F. 2d 158 (1967)	7
Davis v. School District of City of Pontiac, Inc., 487 F.2d 890 (6th Cir. 1973)	9
Lee v. Macon County Board of Education, 453 F. 2d 1104 (5th Cir. 1971)	8
Mays v. Board of Public Instruction of Sarasota County, Florida, 428 F.2d 809 (5th Cir. 1970)	7
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	7

Statute and Constitution Cited

42 U.S.C. § 1983	2
United States Constitution, Fourteenth Amendment	2

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OPINIONS BELOW

The orders of the District and the Tenth Circuit are not reported but are set forth in Appendices A and B of the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether the United States District Court for the Western District of Oklahoma acted within the bounds of its discretion in changing the assignments of principals at two schools in the system which had remained clearly racially identifiable in part because of the system's historical assignment pattern.

STATUTE INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment as set forth at page 3 of the Petition.

STATEMENT OF THE CASE

This phase of this lengthy litigation involves the District Court's effort to further disestablish the racial identifiability of two former "black" senior high schools and to thereby insure compliance with the Court's prior orders.

The District Court has issued repeated orders requiring, in effect, the establishment of a unitary, nonracial school system.[1] The record is replete with substantive and substantiated findings that the school district has not proceeded in good faith to desegregate the schools. Most of those findings were made and upheld prior to the approval of the present comprehensive desegregation plan and prior to the effective functioning of the bi-racial committee.

Since their appointment, the members of the bi-racial committee have made many recommendations for the maintenance and furtherance of desegregation. Upon receipt of suggestions and recommendations from the bi-racial committee, the Court followed the practice of inviting and receiving responses thereto from the parties and thereafter entering ORDERS either approving, disapproving or modifying the suggestions and recommendations. The full record clearly establishes this procedure.

In the instant case, the bi-racial committee recommended in its April 30, 1974 report, *inter alia*, that the races of the principals at four specific senior high schools be changed. The Committee also recommended certain boundary changes for desegregation purposes. The Court entered an ORDER on May 2, 1974, stating that it had approved school board proposals for

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[1] The respective relevant ORDERS were entered on the following dates: (1) July 11, 1963; (2) September 7, 1965; (3) August 16, 1967; (4) August 8, 1969; (5) August 13, 1969; (6) September 11, 1969; (7) January 17, 1970; (8) February 1, 1972; and (9) February 4, 1972.

"minimal changes" in attendance zones of Northeast, Douglas and Grant high schools in order to further "eliminate all vestiges of state imposed segregation." The Court went on to find that despite its prodding, the school system retained numerous vestiges of segregation, for which the board was not undertaking voluntarily to devise and implement appropriate and effective remedies. The Court said:

> "There is no evidence that the individual board members are even reading the Board's own reports to the Court or those of the Bi-racial Committee. Useful and constructive recommendations by the bi-racial committee have repeatedly been totally ignored by the board without even token discussion . . ."
>
> ". . . the Board apparently is repeating the same old pattern of recalcitrance condemned by the Court in its Order of February 1, 1973."

The Court then specifically directed the school board to, on or before May 10, 1974

> *"report in writing to the Court what steps have been taken to comply with the Court's order of August 16, 1973, and shall specifically respond to the suggestions made by the Bi-racial Committee in its report of May 1, 1974."* [Emphasis added]

The Court went further and required the school board to advise on a regular (daily if necessary) basis with the chairman of the bi-racial committee so that the latter body would be able to give "immediate" and intelligent consideration to the recommendations.

On May 29, 1974, the school board responded, stating:

> "[After] . . . careful and deep consideration . . . to the suggestion that the races of the principals be changed at Douglas, Northeast, Marshall and Grant . . . the Board

> concluded that keeping the current principals in these four schools is crucial to the maintenance of stability in these schools, particularly in the fact of student unrest caused by further student assignment, and that the objectives of the suggestion could be accomplished by changing the races of the assistant principals at the schools." [See THIRD REPORT UNDER ORDER DATED MAY 1, 1974]

At no time did the school board request or otherwise indicate to the Court that it wished to be heard either *before* or *after* the Court passed upon the recommendations of the bi-racial committee.

On May 30, 1974, the bi-racial committee reported, *inter alia*, that it felt:

> "the desegregation plan would be advanced significantly if, as a minimum, the principals at Northeast and Douglas were white. The present black principals should be equally able to serve any other high schools in the district."

On June 3, 1974, the Court entered an ORDER which approved the school board's plan to change the assignments of vice principals. The Court's further ORDER related to the race of the two principals at Northeast and Douglas. Said the Court:

> "These are the two high schools in the system which have been and are now clearly racially identifiable in the community. *So long as the two high schools with the largest black enrollment are the only high schools in the system with blacks as the top administration it will be difficult, if not impossible, to erase the racial characteristics of the schools' identity in the community.*" [Emphasis added]

The Court found further that the identifiability factor was buttressed by the pattern of assignments of principals, i.e., white principals in the white communities (kindergarten through

fourth and fifth grade centers): black principals in black communities (fifth grade centers). The Court was aware that in:

> ". . . the normal situation the assignment of school principals is the matter of administration and of no concern to the Court but in the factual context here presented, the Board manifests a policy calculated to maintain the present status of these schools [black] and to discriminate against black administrators." [Bracketing added for clarification]

The school board filed Notice of Appeal on June 12, 1974. The school board also filed a Motion in the District Court to Stay Order pending Appeal. The Motion, which was opposed by respondent, was denied by the District Court on June 21, 1974.

The school board filed a Stay Motion in the United States Court of Appeals for the Tenth Circuit on July 1, 1974, which that Court rejected on July 22, 1974, one judge dissenting.

The school board filed a Motion for Summary Reversal in the United States Court of Appeals for the Tenth Circuit on or about July 25, 1974, which the Court of Appeals rejected on August 9, 1974, one judge dissenting.

On January 28, 1975, the District Court's order of June 3, 1974, was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting.

ARGUMENTS

District Court's Discretion

The District Court acted within the bounds of its discretion in ordering a change in the assignment of the two principals at the two high schools with the largest black enrollment in the system. These two high schools were also the only high schools in the system with blacks as the top administrators. In its effort to disestablish the racially identifiable characteristics of the schools involved, the District Court considered the historical development of the school district during this lengthy litigation and the pattern of assignments of principals in the system. If the action of the District Court is considered in the context of this historical development, it fits clearly within the guidelines of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 19 (1971).

The basis for the District Court's order was in fact the race of the principal at each high school involved. But such a consideration is necessary. See, *Swann v. Charlotte-Mecklenburg Board of Education, supra; Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F. 2d 158, 168 (1967) (Concurring Opinion).

The only argument in opposition to the recommendation of the bi-racial committee submitted by the petitioners to the District Court was that it would affect the stability of the student population. This argument was appropriately rejected. See, *Mays v. Board of Public Instruction of Sarasota County, Florida*, 428 F. 2d 809. 810 (5th Cir. 1970).

DUE PROCESS

Although the respondent contends that a hearing was not necessary before the District Court issued its order, the School Board has not been denied the opportunity for such a hearing.

During the course of this litigation, the bi-racial committee has made many recommendations in its effort to further the goal of the complete desegregation of the Oklahoma City School System. The District Court, in every instance, has invited the responses of the parties to this suit. After considering the proposals and the responses, the Court has entered orders directed to those recommendations. The defendant school board is well aware of this practice. The school board did not, however, request a hearing initially, and has not subsequently requested of the District Court that it hold an evidentiary hearing to consider the proposal of the bi-racial committee.

The District Court acted within its discretion, given the past practices accepted by all parties, in assuming that if the school board wanted a hearing it would advise the Court of its position. Instead, the school board submitted its response as usual. After the District Court issued its order, the school board did not reveal its hidden desire for an evidentiary hearing and request that the District Court reconsider its decision. It, instead, filed a motion in that Court to stay its order pending appeal, and filed notice of appeal on the same date. Again, no mention was made in this motion of a hearing.

The position taken by the school board is untenable, given the prolonged history of segregation in the Oklahoma City School System. As a result of this continuous segregation, the school board has the burden of justifying its administrative and faculty assignments. See, *Lee v. Macon County Board of Education*, 453 F. 2d 1104 (5th Cir. 1971). The District Court's task in

determining the sufficiency of a school system's compliance with desegregation orders is a continuing one. The District Court's June 3, 1974, order is but another necessary step, after more than 13 years of litigation, in assuring constitutional compliance.

Because the District Court's order is based in part on historical considerations peculiar to this school district, a grant of certiorari would require a re-examination of the evidence presented during that period.

The District Court's order is consistent with the decision in *Davis v. School District of City of Pontiac, Inc.*, 487 F. 2d 890 (6th Cir. 1973).

CONCLUSION

For the above reasons, a writ of certiorari should be denied.

Respectfully submitted

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

JOHN W. WALKER
HENRY L. JONES, JR.
WALKER, KAPLAN & MAYS, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201
Attorneys for Respondent

Certificate of Service

This is to certify that on the 12th day of June, 1975, I mailed three copies, postage fully paid, to J. Harry Johnson, 603 First National Center, Oklahoma City, Oklahoma, 73102, and three copies to Larry L. French, P. O. Box 1285, Seminole, Oklahoma, 74868.

JOHN W. WALKER
Attorney for Respondent